manner prescribed by the law of the state in which the service is made * * *.' In accordance with this, we find Rule 2131(a) of the Pennsylvania Rules of Civil Procedure, 12 P. S. Appendix, permitting service on a partnership firm, as equivalent to service on every partner, so far as liability for firm debts are concerned. Service of process here was made upon the defendant partnership and the partners by serving William R. Ross, one of the partners. This service of process was sufficient service upon the partnership as an entity and upon the individual members of the partnership named in the suit to bring all the partners before this court and subject to a judgment in personam. Bowles v. Marx Hide & Tallow Co., D. C., 4 F. R. D. 297; Western Mut. Fire Ins. Co. v. Lamson, D. C., 42 F. Supp. 1007.

The question of venue is procedural, the same as the other incidents hereinabove adverted to, in that it pertains to the place where suit may be brought against a particular defendant and is one of convenience which may be waived. The venue in the present suit is laid where the defendant partnership has its principal place of business and it is accordingly the plaintiff's contention, that since the defendant partnership has been sued and served with process as a jural entity, it should likewise be deemed a jural entity for the purpose of determining where its venue may be laid. *The objective of the Federal Rules is simplicity and practicality, and since the jural entity of the partnership is recognized in the Uniform Partnership Act, 59 P. S. Pa. § 1 et seq., as well as the Pennsylvania Rules of Civil Procedure, it is only in keeping with this progressive trend toward simplicity, that following its adoption as such, with respect to capacity to sue and be sued, as well as in the service of process upon it, its jural entity should be recognized for the purpose of venue.*

As indicative of a broadening scope in the concept of a partnership as a jural entity, some parallel is found in Judge Hand's treatment of an unincorporated association in Sperry Products, Inc., v. Association of American Railroads, 2 Cir., 132 F. 2d 408, 145 A. L. R. 694. Here the defendants moved to dismiss an action on the ground of improper venue, alleging that the various members of the Association were citizens and residents of many states. The following portion of Judge Hand's opinion, 132 F. 2d at page 411, is pertinent: '* * * Since, however, for the purpose of suit it has come to regard them as jural entities, we can see no reason why that doctrine should not be applied consistently to other procedural incidents than service of process, and venue is one of such incidents. Certainly that promotes simplicity, and simplicity was one of the conveniences which induced the original change. Therefore in construing § 48, Jud. Code, 28 U. S. C. A. § 109, in its application to an unincorporated association it seems inevitable that we should attribute an "inhabitancy" to it as though it were a single jural person and not an aggregate.'. *Having determined that an unincorporated association was a jural entity with reference to venue, the court then decided the criterion, for the determination, was where its principal activities took place and permitted suit where it has its principal office or place of business.*

While the above case is not identical in its factual basis, neither is it totally dissimilar, and it affords a rather striking parallel by which we may draw conclusions with respect to the instant case. Accordingly, it would seem more in keeping with the objectives of the Federal Rules of Civil Procedure that the service of process here upon a partner at its principal place of business is sufficient to have the venue well laid here.

It is submitted that the changing legal concept of a partnership from that which obtained under the common law, to that as the Uniform Partnership Act defines it, and as defined in the Pennsylvania Rules of Civil Procedure, gives warrant in holding that this concept of a partnership entity as a jural entity for the purpose of venue, is not an invasion of the legislative field, but a proper status to afford it, in the ever changing economic process.

The motion to dismiss is denied." (Italics added)

The parallel between the *Darby* case and the instant case may be summarized as follows:

(1) Federal jurisdiction in each case was based upon diversity of citizenship.

(2) A partnership, as well as the individual members of the partnership, in each case were named as parties.

(3) The principal place of business of the partnership in each case was located in the district where suit was brought.

(4) Not all members of the partnership in each case resided in the district where suit was brought.

(5) The propriety of venue in each case depended upon whether the principal place of business of the partnership or the places of residence of the members of the partnership controlled.

(6) The applicable federal venue statute in each case was substantially identical.*

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*In the *Darby* case, Section 51 of the Judicial Code, so far as relevant, provided:

(7) Rule 17(b) of the Federal Rules of Civil Procedure required the district court in each case to determine by the law of the state in which the district court was held the capacity of a partnership to sue or be sued.

(8) A partnership was recognized by the law of the state in which the district court in each case was held as having a separate jural entity for purposes of suit.*

"Where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

This provision of the Judicial Code had been construed to mean that venue had to be laid in the district where either *all* plaintiffs or *all* defendants resided. *Smith* v. *Lyon,* 133 U. S. 315 (1890); Moore's Commentary on the U. S. Judicial Code 169-170 (1949); Reviser's Notes to 28 U. S. C. A. § 1391(a).

In the instant case, Section 1391(a) of Title 28 of the United States Code provides:

"A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside."

*In the *Darby* case, Rule 2128(a) of the Pennsylvania Rules of Civil Procedure provided:

"An action against a partnership may be prosecuted against one or more partners as individuals trading as the partnership in the manner designated by Rule 2127(a), or against the partnership in its firm name."

Rule 2127(a) provided:

"A partnership having a right of action shall prosecute such right in the names of the then partners trading in the firm name, in the following manner: 'A, B and C trading as K & Co.'"

In the instant case, Section 222-a of the New York Civil Practice Act provides:

"Two or more persons carrying on business as partners may sue or be sued in their partnership name whether or not such name comprises the names of the persons."

(9) The Uniform Partnership Act, which recognizes a partnership as a separate jural entity, was part of the statutory law of both Pennsylvania and New York.*

(10) The decisional law of both Pennsylvania and New York recognize a partnership as a separate jural entity.**

The District Court below in the instant case refused to follow the *Darby* case for these reasons:

(1) It stated (R. 113):

> "Another distinction stems from the fact that in the *Darby* case the partnership itself was sued. This is not the case here. It has already been indicated above that the suit here has not been brought in the partnership name but in the name of the individual partners as members of a partnership and together they are referred to as the *plaintiffs.*" (Emphasis by Court)

The District Court's point appears to be that, since the individual partners as members of the partnership were not named as parties in the *Darby* case, that distinguishes the *Darby* case from the instant case. *Such distinction is demonstrably invalid, since, as shown*

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*59 P. S. Pa. § 1 *et seq.*; N. Y. Partnership Law § 1 *et seq.* Section 2 of the Uniform Partnership Act, in both Pennsylvania and New York, defines a "person" as including "individuals, partnerships, corporations, and other associations."

***In re Julian*, 22 F. Supp. 97 (M. D. Pa. 1938, Watson, *D. J.*); see cases collected in Note to Rule 2128(a) of Pennsylvania Rules of Civil Procedure.

A full discussion of the New York decisional law recognizing a partnership as a separate jural entity is found at pp. 72-83, *infra*, of this Brief.

above, the individual partners as well as the partnership were named as parties in the Darby case, as in the instant case.

(2) After noting that (R. 112) "the Pennsylvania Partnership Law and the Pennsylvania Rules of Civil Procedure established the partnership as a separate legal entity apart from the partners" and that "such a separate legal entity had a residence separate from that of the partners," the District Court below in the instant case then stated (R. 113):

> "I am rather persuaded by the argument that under New York Law, which this District Court is compelled to follow, the partnership is not a separate jural entity from that of its individual partners and that its residence is that of the individual partners."

*This distinction likewise is demonstrably invalid, since, as shown above, the Pennsylvania Partnership Law and the New York Partnership Law, in all respects here material, are identical; similarly, Section 2128(a) of the Pennsylvania Rules of Civil Procedure and Section 222-a of the New York Civil Practice Act both recognize a partnership as a separate jural entity for purposes of suit; and moreover the decisional law of both Pennsylvania and New York recognizes a partnership as a separate jural entity.**

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*The 60 year old case of *Smith* v. *Lyon*, 133 U. S. 315 (1890), relied upon by the District Court below as holding that "two partners could not sue in a district where only one of them resided" (R. 109) is not applicable to the instant case because (1) it was decided long

In claiming that the District Court below erred in refusing to follow the *Darby* case, we of course do not claim that the decision of the District Court for the Eastern District of Pennsylvania in that case necessarily was binding upon the District Court here. We do say that the *Darby* case, because of its precise parallel to the facts of the instant case and because of its sound reasoning, should have been highly persuasive to the District Court below and that the utterly invalid distinctions which persuaded the District Court to decide the instant case directly contrary to the *Darby* case gave rise to error which should be corrected.*

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before Rule 17 (b) authorized district courts to look to the law of the state where they are sitting to determine the capacity of a partnership to sue or be sued; (2) there was no Missouri statute similar to C. P. A. § 222-a permitting a partnership to sue or be sued in its firm name; (3) there was no showing in the *Smith* case as to where the partnership's principal place of business was located; and (4) the court did not decide whether a partnership suit could be brought in the district of the firm's principal place of business. The *Smith* case held only that the provision of the federal venue statute then applicable to diversity cases that "suit shall be brought only in the district of the residence of either the plaintiff or the defendant" meant in the district of *all* plaintiffs or *all* defendants. Reviser's Notes to 28 U. S. C. A. § 1391 (a).

The district court in the *Darby* case was not persuaded that the *Smith* case was applicable to the facts of the *Darby* case.

*The "principal place of business" test for determining venue in partnership cases, as was done in the *Darby* case, has been commented on with approval by Professor Moore who points out, with respect to the "principal place of business" test as evolved by the Court of Appeals for the Second Circuit in *Sperry Products, Inc.* v. *Association of American Railroads,* 132 F. (2d) 408 (C. C. A. 2, 1942), *cert. den.* 319 U. S. 744 (1943), that "While the *Sperry Products* case dealt with an unincorporated association and not a partnership, it should be followed with regard to partnerships as well" and he points out that this test was adopted in the *Darby* case. 3 Moore's Federal Practice 1416 (2d ed. 1948).

(C) The District Court Erred in Refusing to Follow the Analogous Reasoning of *Sperry Products, Inc.* v. *Association of American Railroads.*

The District Court in the *Darby* case relied by analogy upon the decision of the Court of Appeals for the Second Circuit in *Sperry Products, Inc.* v. *Association of American Railroads,* 132 F. (2d) 408 (C. C. A. 2, 1942), *cert. den.* 319 U. S. 744 (1943), as "indicative of a broadening scope in the concept of a partnership as a jural entity" (73 F. Supp. 522, 524).* The plaintiff in the *Sperry Products* case brought suit for infringement of a patent against the A. A. R., an unincorporated association, in the Southern District of New York where its principal place of business was located. Under the venue statute then applicable to patent suits,** venue was required to be laid "in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership or corporation, shall have committed acts of infringement and have a regular and established place of business." After reviewing the progress by which the law had come to regard unincorporated associations as jural entities for purposes of suit, in such cases as *United Mine Workers* v. *Coronado Coal Company,* 259 U. S. 344 (1922), Judge Learned Hand stated (132 F. (2d) 408, 411):

> "Since, however, for the purpose of suit it has come to regard them as jural entities, we can see no reason why that doctrine should not be applied consistently to other procedural incidents than service of process, and venue is one of such incidents. Cer-

*The District Court below in the instant case refused to follow the analogous reasoning of the unincorporated association cases "since unincorporated associations are *sui generis*" (R. 111).

**Section 48 of the Judicial Code, 28 U. S. C. A. § 109 (1940).

> tainly that promotes simplicity, and simplicity was one of the conveniences which induced the original change. Therefore in construing § 48, Jud. Code, 28 U. S. C. A. § 109, in its application to an unincorporated association it seems inevitable that we should attribute an 'inhabitancy' to it as though it were a single jural person and not an aggregate."

The court held that the A. A. R. as an unincorporated association was an "inhabitant" of the district where it had its principal place of business. Accordingly the judgment of the District Court for the Southern District of New York dismissing the complaint on the ground venue had been laid in the wrong district, was reversed.*

As heretofore indicated, the "principal place of business" test for determining the propriety of venue in an unincorporated association case, laid down by the Court of Appeals for the Second Circuit in the *Sperry Products* case, should be followed with regard to partnership cases as well, in the opinion of Professor James William Moore, the distinguished Special Consultant to the Revision Staff which revised Title 28 of the United States Code relating to the Judiciary and Judicial Procedure; he states in 3 Moore's Federal Practice 1416 (2d ed. 1948):

> "While the *Sperry Products* case dealt with an unincorporated association and not a partnership, it should be followed with regard to partnerships as well. As we have seen, the analogy to corporations drawn by the court in the *Sutherland* case is entirely unworkable as applied to a partnership having mem-

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*The *Sperry Products* case was followed in *Brotherhood of Locomotive Firemen and Enginemen* v. *Graham*, 175 F. (2d) 802, 804-805 (App. D. C. 1948), *rev'd on other grounds* 338 U. S. 232 (1949).

> bers who are citizens of more than one state A workable alternative is the 'principal place of business' test used in the *Sperry* case, and this has been adopted" (citing the *Darby* case).

The case of *Sutherland* v. *United States,* 74 F. (2d) 89 (C. C. A. 8, 1934), referred to by Professor Moore above as "entirely unworkable as applied to a partnership having members who are citizens of more than one state", was relied upon heavily and quoted from at length by the District Court below (R. 110-111). In the *Sutherland* case, the United States sued to enjoin a partnership and its two individual members from violating the National Industrial Recovery Act; *jurisdiction was not based on diversity of citizenship.* Suit was brought in the District of Nebraska where the partnership was doing some business, *although it does not appear whether the partnership's principal place of business was in Nebraska.* The court assumed that the partnership could be sued as a separate legal entity under the law of Nebraska and that the N. I. R. A. required it to be treated as a person for the purposes of federal jurisdiction. Since the individual partners both resided in Missouri, however, the court held that the action must be dismissed because venue was improperly laid under the statute requiring such suit to be brought "within the district of which the defendant is an inhabitant."* The court discussed at length the issue of whether *for purposes of federal jurisdiction,* a partnership should be regarded as analogous to a corporation; it concluded as follows (p. 93):

> "Since a corporation, as a juridical person, is an inhabitant of the state of which it is a citizen, we think

*Section 51 of Judicial Code, 28 U. S. C. A. § 112 (1940).

a partnership is likewise to be regarded as an inhabitant of the state of which it is a citizen, namely, the state of which the partners are citizens.

Our conclusion is that this partnership, for the purpose of this suit, must be regarded as a citizen of Missouri, wherein the partners reside."

The foregoing language and holding of the *Sutherland* case (expressly relied upon by the District Court below (R. 110-111) to the exclusion of the sounder reasoning of the *Darby* case (R. 112-113) and to the exclusion of the analogous reasoning of the unincorporated association cases (R. 111)) has been appropriately criticized by Professor Moore in 3 Moore's Federal Practice, 1414-1415 (2d ed. 1948):

> "The doctrine of this case [the *Sutherland* case] is unsatisfactory since it does not lay down a workable rule for partnerships or other unincorporated associations that are composed of many persons, citizens and residents of many states. Where is the venue to be laid? The rule of suability enunciated in the *Coronado* case and extended and promulgated in Rule 17 (b) to cover federal cases is seriously impaired unless a practical rule on venue is evolved, for in cases involving a federal right, venue must be laid in the district of which the defendant is an inhabitant, unless there is some special venue statute providing otherwise, or there is a waiver of venue. Therefore every time the defendant is an unincorporated association in this class of cases the problem of venue would be acutely presented."

The process by which a partnership has become assimilated to an unincorporated association (referred to by Judge Learned Hand in the *Sperry Products* case, *supra,* at p.

410) is reflected in the Federal Rules of Civil Procedure and the New York cases. Rule 4 (d) (3) provides interchangeably for service of process "upon a partnership or *other* unincorporated association"; likewise, Rule 17 (b), dealing with the capacity of a partnership to sue or be sued, refers interchangeably to "a partnership or *other* unincorporated association" (Italics added). In the case of *Hibbs* v. *Brown,* 112 App. Div. 214 (1st Dept. 1906), *aff'd* 190 N. Y. 167 (1907),* the court stated (p. 218):

> "The Adams Express Company, however, is not a corporation. It is a joint-stock association. The stockholders of such an association are partners, and may be ultimately held liable as such for the debts and obligations of the association".

Likewise in *Chapman* v. *Barney,* 129 U. S. 677 (1889), this Court referred to a New York unincorporated association as equivalent to a partnership (p. 682):

> "The allegation of the amended petition is, that the United States Express Company is a joint stock company organized under a law of the State of New York, and is a citizen of that State. But the express company cannot be a *citizen* of New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation. The allegation that the company was *organized* under the laws of New York is not an allegation that it is a corporation. In fact, the allegation is, that the company is *not* a corporation, but a joint-stock company—that is, a mere partnership." (Emphasis by Court)

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*This decision has been characterized as a "commendable example of judicial realism." Dodd, *Dogma and Practice in the Law of Associations,* 42 Harv. L. Rev. 977, 1007 (1929).

In summarily dismissing the analogy of the unincorporated association cases in its application to the venue question presented in the instant case, "since unincorporated associations are *sui generis* (R. 111), the District Court below blinded itself to the striking parallel between unincorporated associations and partnerships now well recognized in the law. This parallel so impressed the district court in the *Darby* case that, upon facts on all fours with those of the instant case, it rested its decision in part upon the decision in the *Sperry Products* case where the jural entity concept of an unincorporated association for purposes of suit was extended to the procedural incident of venue. To extend likewise the jural entity concept of a partnership for purposes of suit to the procedural incident of venue, as was done in the *Darby* case, is to recognize the economic realities implicit in the partnership form of business organization—realities which Congress surely did not intend should be discarded in favor of such an unrealistic result as the District Court's construction of Section 1391 (a) has produced in the instant case.

(D) The District Court Erred, in Attempting to Carry Out the Mandate of Rule 17(b), in Holding That Under New York Law a Partnership Is Not a Jural Entity Separate from Its Individual Partners.

Rule 17(b) required the District Court to examine the law of New York to ascertain the capacity of a partnership to sue, but it is doubtful that "Rule 17(b) . . . requires an examination of the law of the state to ascertain *whether a partnership is a legal entity with a residence separate and apart from those of the partners*" (Italics added), as the District Court thought (R. 111). Even if it did, Section

222-a of the New York Civil Practice Act furnishes the complete answer: a partnership is recognized as a separate legal entity for purposes of suit. The District Court, however, held to the contrary (R. 111-112); it moreover held that a partnership is not a jural entity separate from its individual partners under either the statutory or decisional law of New York (R. 113). In so holding, the District Court erred.

(1) The New York Civil Practice Act, Section 222-a, Recognizes a Partnership As a Separate Jural Entity.

To ascertain that under New York law a partnership can sue in its own name and accordingly is recognized as a separate jural entity for purposes of suit, it would seem unnecessary to look further than C. P. A. § 222-a*:

> "Two or more persons carrying on business as partners may sue or be sued in their partnership name whether or not such name comprises the names of the persons. * * *"

Effective September 1, 1945 (Laws 1945, ch. 842), C. P. A. § 222-a brought about a sharp change in the attitude of the New York law toward a partnership, treating it as an entity for purposes of suit; prior thereto** a partnership was not permitted to sue or be sued in the partnership name, but only in the names of the individuals com-

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*Similarly, in the *Darby* case, Section 2128(a) of the Pensylvania Rules of Civil Procedure recognized a partnership as a separate jural entity for purposes of suit. See discussion at pp. 57-59, *supra*, of this Brief.

**E.g. *Rosseau* v. *W. C. Langley Co.*, 8 Fed. Rules Serv. 17 b. 3, Case 1 (S. D. N. Y. 1944, Bondy, D.J.).

prising the partnership.* Upon this ground, decisions by the New York courts prior to 1945 which refused to recognize partnerships as separate jural entities for purposes of suit, are distinguishable.** C. P. A. § 222-a was intended to bring New York law into harmony with the law of other jurisdictions which recognizes a partnership as a separate jural entity for purposes of suit, including particularly Rule 17 (b) of the Federal Rules of Civil Procedure.*** Moreover, C. P. A. § 222-a was not intended to restrict

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*The Eleventh Annual Report of the Judicial Council of the State of New York, Legislative Document No. 15 (1945), commented upon the proposed §222-a, in part, as follows (p. 224):

> "It is recommended that a new section, to be numbered 222-a, be added to the Civil Practice Act. The proposed new section would provide that two or more persons carrying on business as partners may sue or be sued in their partnership name, whether or not such name comprises the names of the persons. *Under existing law, a partnership may not sue or be sued in the partnership name, but may sue or be sued only in the respective names of its individual members.* The rule that a partnership may not sue or be sued in its partnership name is merely a useless relic of the strict procedural rules at common law with nothing, apparently, to justify its continued existence. *The common law rule derives from the legal conception of the partnership as simply a group of individuals.* It is particularly undesirable in actions against partnerships because it places upon the plaintiff, the burden of ascertaining the individual members of a partnership and naming them as defendants." (Italics added)

**_E.g. Bulkley_ v. _O'Donnell,_ 148 Misc. 186 (Sup. Ct., Albany Co., 1933), _aff'd_ 240 App. Div. 929 (3d Dept. 1933); _Searle_ v. _Foltis-Fischer Corp.,_ 246 App. Div. 620 (2d Dept. 1935). Both of these cases are discussed at p. 73n, _infra,_ of this Brief.

***_Id_ at 225-226:

> "In other jurisdictions, liberal provisions permitting partnerships to sue or be sued in the partnership name are already in force. For example, Rule 17(b) of the Federal Rules of Civil Practice recognizes the right of a partnership to 'sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States'."

partnership litigation to suits brought in the name of the firm or against the name of the firm; the names of the individual firm members may also be stated, as in the instant case.*

The District Court below sought to mitigate the effect of C. P. A. § 222-a upon the problem presented in the instant case by referring to the section in these words (R. 111): "It was merely a device to facilitate partnership litigation." *That is precisely our point!* The Legislature, in enacting C. P. A. § 222-a, clearly recognized the jural entity concept of a partnership for purposes of suit *to facilitate partnership litigation.* The District Court, in failing to recognize that the procedural incident of venue is inextricably tied up with the Legislature's determination to facilitate partnership litigation, has misconstrued C. P. A. § 222-a and thus has erroneously applied Rule 17 (b) to the facts of the instant case.**

**Id* at 226:

> "It should be noted that the right to sue or be sued in the partnership name conferred by the recommended section is an additional and permissive, and not a substitutional or mandatory, provision. Therefore, the parties may if they prefer, proceed as heretofore by stating the respective names of the individual partners."

**The District Court also (R. 111-112) sought to escape the clear effect of C. P. A. §222-a in its recognition of a partnership as a separate jural entity *for purposes of suit* by referring to the following *footnote* to the comment upon the proposed amendment of *C. P. A. §1197 (the "Joint Debtor Act")* contained in the Eleventh Annual Report of the Judicial Council of the State of New York, Legislative Document No. 15 (1945), at p. 233, footnote 24:

> "It is assumed in the discussion of the validity of the recommended amendments, that the enactment of recommended section 222-a permitting suits by and against a partnership in the partnership name, together with present sections 12 and 21 of the Partnership Law permitting partnerships to hold real property in the partnership name will not be held to have

(2) The New York Partnership Law (Uniform Partnership Act) Recognizes a Partnership As a Separate Jural Entity.

The district court in the *Darby* case referred to the fact that "the jural entity of the partnership is recognized in the Uniform Partnership Act".* The court was referring of

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> the effect of converting partnerships into legal entities having a separate existence from that of the partners. Such effect is believed to be unlikely."

It should be noted that this footnote reference was lifted by the District Court out of its context. It did not accompany the "Comment" concerning the proposed §222-a, but was a footnote to a "Comment" concerning the proposed amendment of §1197. This is the sentence the footnote was meant to explain:

> "Since a partnership is not a legal entity,[24] the doctrine that a foreign corporation not doing business within the state is not subject to personal service although one of its officers or directors happens to be in New York temporarily, would not seem to apply to the case of a partner coming into New York temporarily."

It is obvious that footnote 24 referred to the problem of the validity of service of process in New York upon a non-resident partner of a partnership not doing business in New York but who was caught temporarily in New York—a problem wholly foreign to that of the instant case.

Moreover the reference in this footnote to Sections 12 and 21 of the New York Partnership Law permitting partnerships to hold real property refers to the sharp departure brought about by the Uniform Partnership Act from the common law notion that "A partnership being an aggregate of individuals was not deemed a person". *Id.* p. 225n.

*The district court in the *Darby* case stated in this connection (73 F. Supp. 522, 524):

> "The objective of the Federal Rules is simplicity and practicality, and since the jural entity of the partnership is recognized in the Uniform Partnership Act, 59 P. S. Pa. §1 *et seq.*, as well as the Pennsylvania Rules of Civil Procedure, it is only in keeping with this progressive trend toward simplicity, that following its adoption as such, with respect to capacity to sue and be sued, as well as in the service of process upon it, its jural entity should be recognized for the purpose of venue."

course to the Pennsylvania Partnership Law. The District Court below in the instant case took note of the fact that (R. 112) "the Pennsylvania Partnership Law and the Pennsylvania Rules of Civil Procedure established the partnership as a separate legal entity apart from the partners" and that "such a separate legal entity had a residence separate from that of the partners." But then the District Court below proceeded to hold in the instant case (R. 113) "* * * that under New York Law, which this District Court is compelled to follow, the partnership is not a separate jural entity from that of its individual partners and that its residence is that of the individual partners."

In so holding, the District Court not only failed to recognize the parallel between Section 2128 (a) of the Pennsylvania Rules of Civil Procedure and Section 222-a of the New York Civil Practice Act (both of which treat a partnership as a separate entity for purposes of suit), but also completely overlooked the fact that the Uniform Partnership Act is part of the statutory law of New York,* as it is in Pennsylvania.** As a matter of fact, there is not a single reference in the opinion of the District Court below to the fact that the Uniform Partnership Act is part of the statutory law of New York and has been since October 1, 1919.***

While we recognize that the Uniform Partnership Act proceeds in part upon the entity theory and in part upon the aggregate theory and learned commentators have debated upon the subject for years, the fact remains that the Act, in both Pennsylvania and New York, defines a *"person"* as

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*N. Y. Partnership Law §1 *et seq.*

**59 P. S. Pa. §1 *et seq.*

***Laws 1919, ch. 408.

including "individuals, *partnerships,* corporations, and other associations" (Section 2)*; the *partnership* may take title to real estate and convey it in the firm name (Section 8); a partner is the agent of the *partnership* (Section 9); a fraud may be committed by a partner on the *partnership,* not on the co-partners (Section 12); a partner is under duty to contribute to *partnership* losses (Section 18(a)) and this is a duty owed to the *partnership,* not to the co-partners, since the right to contribution is a *partnership* asset (Section 40a); indemnification by the *partnership,* not by the co-partners, is provided for with respect to certain payments made by a partner (Section 18 (b)); a partner is accountable to the *partnership,* not to the co-partners (Section 21); and after dissolution, a partner has the power to bind the *partnership,* not the co-partners (Section 35).

We submit that the error committed by the District Court below in holding that under New York law a partnership is not a jural entity separate from its individual partners, stems in part from the District Court's overlooking the fact that the Uniform Partnership Act is part of the statutory law of New York.

(3) The New York Decisional Law Recognizes a Partnership As a Separate Jural Entity.

While the New York courts in special situations have declined to treat a partnership as an entity separate from the individual members of the partnership where to treat

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*The definition of a partnership as a "person" appears in other uniform acts which are part of the New York statutory law: Uniform Sales Act §76 [N. Y. Pers. Prop. Law §156]; Uniform Bills of Lading Act §53 [N. Y. Pers. Prop. Law §239 (1)]; Uniform Warehouse Receipts Act §58 [N. Y. Gen. Bus. Law §142(1)].

it as an entity would work an injustice,* they have rec-

**Jones* v. *Blun,* 145 N. Y. 333 (1895) (stockholder in corporation not permitted to invoke partnership-entity fiction to shield him as co-partner from effect of statute forbidding preference to stockholders "or to enable him to do as a partner that which the law prohibits him from doing as an individual"); *People* v. *Knapp,* 206 N. Y. 373 (1912) (to prevent circumvention of Banking Law prohibition against loan in excess of one-tenth of capital stock of trust company to any director "directly or indirectly", loan to partnership of which director was partner was held to be loan to director); *Matter of Lyle* v. *Lyle Cider & Vinegar Co.,* 243 N. Y. 257 (1926) (wife of deceased partner denied award under Workmen's Compensation Law on theory he was employee of firm of which he was member at time of fatal injuries—court refused to treat firm as entity for purpose of regarding member of firm as employee); *Caplan* v. *Caplan,* 268 N. Y. 445 (1935) (since wife cannot sue husband for personal injuries, she is not permitted to sue partnership of which her husband was a member to recover damages for injuries caused by negligence of husband while driving automobile on firm business—This decision has been criticized by Professor Gerdes in Note, *Rights of a Wife Against Her Husband's Partners for Partnership Torts,* 5 Brooklyn L. Rev. 174 (1936)); *Williams* v. *Hartshorn,* 296 N. Y. 49 (1946) (to prevent violation of "not only the letter of the statute [Workmen's Compensation Law], but, also, its very spirit and purpose", administrator of partnership employee not permitted to maintain common law action for negligence against partner who owned premises where partnership business was carried on and where employee was killed, no such action being permitted against firm); *Wadsworth* v. *Webster,* 237 App. Div. 319 (3d Dept. 1932) (same facts and same holding as in *Caplan* case); *Bergstrom* v. *Ridgway-Thayer Co.,* 53 Misc. 95, *aff'd* 119 App. Div. 889 (1st Dept. 1907) (libel action cannot be maintained on behalf of partnership itself but only on behalf of individual members thereof, although co-partners were libeled in their firm name); *Bulkley* v. *O'Donnell,* 148 Misc. 186, *aff'd* 240 App. Div. 929 (3d Dept. 1933) (on ground that partnership, whose principal place of business was in New York County, "may sue or be sued only through the members composing it", motion to change venue from Albany County, where one of plaintiff partners resided, to Essex County, where defendant resided, denied—*This decision antedates C. P. A. §222-a permitting suit by or against partnership in firm name*); *Searle* v. *Foltis-Fischer Corporation,* 246 App. Div. 620 (2d Dept. 1935) (same result as in *Bulkley* case and distinguishable on same ground); *MacKenzie* v. *Climax Industries,* 73 N. Y. S. (2d) 504 (1947) (*held* that co-partners, though residents of Nevada, could sue in Kings County, where partnership's place of business is located, since foreign corpo-

ognized a partnership as a separate jural entity, for both substantive and procedural purposes, in many cases over a period of more than a century and extending down to the present day.

In the early case of *Warner & Post* v. *Griswold,* 8 Wendell's Reports 665 (1832), referring to two attorneys who were practicing as partners, the court stated (p. 666):

> "They constitute *but one person in law.*" (Italics added)

In *Cole* v. *Reynolds,* 18 N. Y. 77 (1858), the court recognized, *for the purposes of trial,* the distinct separate entities of the partnerships which were parties to the action (p. 78):

> "This would seem to be more in accordance with the common sense of the commercial world, and the rule of equity *which treats a copartnership firm, for the purposes of a trial, as an artificial body, a quasi corporation.*" (Italics added)

The distinction between the types of demand required upon a note drawn by partners and one by non-partners was stated in *Gates* v *Beecher,* 60 N. Y. 518 (1875), at p. 523:

> "It is seen, therefore, that there is a distinction taken between the case of a note of joint makers who are not partners, and a note of partners who are still partners at the maturity of the note. *That distinction rests upon the fact that partners are but one person, in legal contemplation.* * * *" (Italics added)

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rate defendant was doing business in New York--*dictum* that "partnership has no residence distinct from the residence of the individual partners", such dictum based on *Bulkley* and *Searle* cases, both of which antedated C. P. A. §222-a).

In discussing the extent of the liability of two partnerships, drawer and drawee, respectively, upon a promissory note in *Second National Bank* v. *Burt,* 93 N. Y. 233 (1883), the court observed (p. 245):

> "So far as the liability of such firms is concerned *they each constitute legal entities,* assuming and performing their respective obligations, and each holding exclusive funds to effect the objects of its association." (Italics added)

One of the classic situations where the separate entity of a partnership is recognized is in the marshalling of assets of an insolvent firm, as in *Bulger* v. *Rosa,* 119 N. Y. 459 (1890),* where the court stated (p. 465):

> *"The partnership as such has its own property* and its own creditors, *as distinct from the individual property of its members* and their individual creditors." (Italics added)

In holding that a mortgage given by an individual to secure his promissory notes did not also constitute security for partnership notes given by the individual in the firm

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*Other New York cases which, over a span of many years, have recognized a partnership as a separate entity for purposes of marshalling assets: *Wilson* v. *Robertson,* 21 N. Y. 587 (1860); *Peyser* v. *Meyers,* 135 N. Y. 599 (1892), at p. 604: "The corpus of the firm property belongs to *the firm as an entity,* and not to the individual partners * * *" (Italics added); *In re Peck,* 206 N. Y. 55, 60 (1912); *Silberfeld* v. *Swiss Bank Corporation,* 273 App. Div. 686 (1st Dept. 1948), *aff'd* 298 N. Y. 776 (1948), at p. 688: "A partnership as such can of course participate in a joint venture. Whatever is due the partnership as a member of the joint venture belongs to the partnership and must be paid over to those conducting the affairs of the partnership so that the assets can be applied in the payment of the obligations of the separate partnership. *For the purposes of mashalling assets equity will regard the partnership as a legal entity apart from its members."* (Italics added)

name, the court stated in *Bank of Buffalo* v. *Thompson,* 121 N. Y. 280 (1890), at p. 282:

> "In ordinary commercial language the obligation of a firm would not be spoken of as the obligation of any one of its members, *and a firm is regarded as an entity distinguished from all the individual members of which it is composed.* In Parsons on Partnership, 346, it is said: 'A partnership is a legal body by itself.' We do not say it is a corporation, because it wants some of the most essential elements of a corporation, *but we say it is a body by itself, and is so recognized by the law for some purposes, and should be always in a proper way, and to a proper degree—for all purposes;*" (Italics added).

With respect to the title of partnership property, it was said in *Costello* v. *Costello,* 209 N. Y. 252 (1913), at p. 259:

> "The title to partnership property is not in the individual members of the firm * * * *but it is in the firm as an entirety* * * *" (Italics added).

The Court of Appeals, in the leading case of *Hartigan* v. *Casualty Co. of America,* 227 N. Y. 175 (1919),* after reviewing the cases of *Matter of Peck, supra, Jones* v. *Blun, supra,* and *Bank of Buffalo* v. *Thompson, supra,* held that

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*Other decisions by the New York courts which have followed the *Hartigan* case in recognizing a partnership as an entity separate from the individual partners who compose it: *Jacobs* v. *Maryland Casualty Co.,* 198 App. Div. 470 (3d Dept. 1921), *aff'd* 234 N. Y. 622 (1922); *Amish* v. *Amish,* 209 App. Div. 337 (3d Dept. 1924); *Ardolino* v. *Ierna,* 225 App. Div. 439 (3d Dept. 1929), at p. 440: *"It is no new doctrine that a partnership is a separate entity from that of the individuals who constitute its members."* (Italics added); *Geitner* v. *United States Fidelity & Guaranty Co.,* 251 N. Y. 205 (1929).

an automobile insurance policy issued in favor of a partnership does not cover liability of individual members of the firm, thus drawing a distinction between the firm as an entity and the individual members who compose it (p. 179):

> "So here, *we think that among business men a distinction is made between the firm of Hartigan & Dwyer and the members who compose it* and that the policy is not broad enough to cover the liability of the members of the firm for which the firm itself was not liable." (Italics added).

In *Bernard* v. *Ratner,* 7 N. Y. Supp. (2d) 717 (City Court, N. Y. Co., 1938), the court held that the partnership was a distinct entity:

> "S. Stein & Co. is a sufficiently *distinct entity in the law,* having for some purposes *a personality beyond that of its members* * * *" (Italics added).

The contention, made in *Matter of Schwartzman,* 262 App. Div. 635 (3d Dept. 1941), *aff'd* 288 N. Y. 568 (1942), that a partnership is not a legal entity separate and apart from the individuals composing the firm was rejected as not applicable in determining whether the term "employer", as used in the Unemployment Insurance Law (N. Y. Labor Law, § 502), meant a partnership or the individuals composing the firm (p. 636-637):

> "Appellants place great emphasis on the fact that a partnership is not a legal entity separate and apart from the individuals composing the firm. While that statement is correct as a general rule *yet for many purposes a partnership is regarded by the courts as a separate entity*" (Italics added).

* * *

> "It is quite significant that under the definition of 'employer' the Legislature has used the word 'partnership' and not the word 'partner,' referring to the firm as a whole and as a separate employing unit. *Obviously it was the legislative intent to treat a partnership as an employing unit separate and apart from its several partners*" (Italics added).

In *Williams* v. *Hartshorn*, 296 N. Y. 49 (1946), the Court of Appeals referred to the *Schwartzman* case, *supra*, when it stated that *"the Legislature has the right to consider a partnership apart from its members"* (p. 51) (Italics added). Of course that is precisely what the Legislature did in 1945 when it enacted C. P. A. § 222-a, recognizing a partnership as a separate jural entity for purposes of suit.

In the recent case of *Wegman* v. *Republic Camera Co.*, 190 Misc. 513, 75 N. Y. Supp. (2d) 745 (Sup. Ct., N. Y. Co., 1947),* a partnership was held to be a "resident" of the county where its principal place of business was located for purposes of obtaining a trial preference under Rule V of the New York County Supreme Court Rules for Trial Terms which limits trial preferences, upon applications by plaintiffs, to those who are residents of New York County. In the *Wegman* case, although the individual members of the plaintiff partnership (who, incidentally, sued "Individually and as Copartners Doing Business under the Name of Leonard S. Wegman & Co.") resided in Nassau and Kings Counties, the principal place of business of the partnership was in New York County. Justice McNally granted the plaintiffs' motion for a preference, stating (pp. 516-517):

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*In accord with the *Wegman* case: *Jenkins* v. *Stern*, N. Y. L. J., May 16, 1935, p. 2533, col. 6.

"Probably more businesses are carried on in partnership form in New York County than in any other county in the State or, for that matter, in the Nation. These partnerships are engaged in manifold commercial and business activities. The outgrowth of some of those transactions is bound to be litigation in our court. In the main, these matters are peculiarly indigenous to New York County, the commercial center of the world."

* * *

"The granting of preferences is purely procedural. *The common-law theory of the nature of a partnership should not be the deciding factor.*" (Italics added.)

In the *Wegman* case, the defendant urged in opposition to the motion, the case of *Bulkley* v. *O'Donnell*, 148 Misc. 186 (Sup. Ct., Albany Co., 1933), *aff'd* 240 App. Div. 929 (3d Dept. 1933), which we have referred to at page 73n, *supra*, of this Brief. The defendant argued before Justice McNally in the *Wegman* case that under the *Bulkley* decision a partnership, as such, has no residence distinct from the residences of the partners. Justice McNally rejected this argument (p. 516), *pointing out that at the time of the decision in the Bulkley case, 1933, a partnership could sue or be sued only through the members composing it —a situation which was sharply changed by the Legislature in 1945 when it enacted C. P. A. § 222-a permitting a partnership to sue or be sued in the partnership name as well as in the name of the individual partners.*

The Court of Appeals below should have followed such decisions by the lower New York courts as that in the *Wegman* case, particularly when it is so squarely appropriate to the problem presented in the instant case, recognizing

that a partnership as a separate legal entity has a residence for procedural purposes of trial where its principal place of business is located, despite the fact that none of the individual members of the firm reside there. Absent "persuasive data" that the New York Court of Appeals would hold to the contrary, the Court of Appeals below should have followed such a decision as that in the *Wegman* case. *West* v. *A. T. & T.*, 311 U. S. 223 (1940); *Cooper* v. *American Airlines*, 149 F. (2d) 355 (C. C. A. 2, 1945).

We believe it is fair to state, in summarizing the New York law with regard to a partnership as a separate jural entity, that, while the New York courts have refused to recognize a partnership as an entity in some situations—usually to prevent a failure of justice, they have treated a partnership as a jural entity separate and apart from the individual members who compose it in an overwhelming majority of the cases.* The New York Court of Appeals, as recently as 1946, in the *Hartshorn* case, *supra*, recognized the right of the Legislature to consider a partnership as an entity apart from its members. A year earlier, in 1945, the Legislature, in enacting C. P. A. § 222-a, had granted

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*This view of a partnership as a jural entity separate and apart from the individual members who compose it is in accord with the views of many learned writers. 30 Cyc. 42, Partnership, n. 93 (1908); 47 C. J. 747, Partnership § 172 (1929); 40 Am. Jur. 137, Partnership § 18 (1942); Parsons, Law of Partnership 528 (4th ed. 1893); 1 Pollock & Maitland 469 (1895); Gilmore, Handbook On The Law of Partnerships 113 (1911); 1 Rowley, the Modern Law of Partnership 23 (1916); Ludlow, *On the Mercantile Notion of "The Firm", and the Need of Its Legal Recognition*, 2 Jurid. Soc. Papers 40 (1857); Burdick, *Some Judicial Myths*, 22 Harv. L. Rev. 393 (1909); Magruder & Foster, *Jurisdiction Over Partnerships*, 37 Harv. L. Rev. 793 (1924); Sturges, *Unincorporated Associations As Parties to Actions*, 33 Yale L. J. 383 (1924); Dodd, *Dogma And Practice In The Laws Of Associations*, 42 Harv. L. Rev. 977, 1012 (1929); Laski, *The Personality Of Associations*, 29 Harv. L. Rev. 404 (1915).

to partnerships the right to sue in their own names, thus recognizing that for procedural purposes of suit a partnership should be regarded as a jural entity separate from its members—indeed, "to facilitate partnership litigation" (R. 111). One of the procedural incidents of suit is the place of trial and, we submit, a partnership's right to lay venue in the forum of its principal place of business is a necessary and logical concomitant of full recognition of a partnership as a separate jural entity for purposes of suit. No New York court, so far as we have been able to discover, since 1945 has held that a partnership, for purposes of suit, is not to be treated as a jural entity separate from its members; any such decision would be contrary to C. P. A. § 222-a which, in our view, is decisive of this case. The *Wegman* case, *supra,* squarely has held that, for procedural purposes of suit, a New York partnership is a "resident" of the county where its principal place of business is located, even though the individual members of the firm live in other counties.

The authorities upon which the District Court below relied, in holding (R. 113) "that under New York Law, which this District Court is compelled to follow, the partnership is not a separate jural entity from that of its individual partners and that its residence is that of the individual partners", are readily distinguishable:

(1) *Caplan* v. *Caplan,* 268 N. Y. 445 (1935).

This case, decided prior to C. P. A. § 222-a, did not involve any question of whether a partnership should be treated as a jural entity for procedural purposes of suit; it held as a substantive matter that a wife could not sue the partnership of which her husband was a member to recover

damages for injuries caused by the negligence of her husband while driving an automobile on firm business, since she could not sue her husband individually for personal injuries. (See p. 73n, *supra*)

(2) *Williams* v. *Hartshorn,* 296 N. Y. 49 (1946).

Here, again, there was involved no question of whether a partnership should be treated as a jural entity for procedural purposes of suit; the holding was, as a matter of substantive law, that the administrator of a partnership employee could not maintain a common law action for negligence against the partner who owned the premises where the partnership business was carried on and where the employee was killed, since no such action could be brought against the firm. The court based its decision on a determination to prevent violation of "not only the letter of the statute (Workmen's Compensation Law), but, also, its very spirit and purpose" (p. 51). The court further stated that "the Legislature has the right to consider a partnership apart from its members" (p. 51), which is just what the Legislature did in 1945 when it enacted C. P. A. § 222-a recognizing a partnership as a jural entity separate from its members for purposes of suit. (See p. 73n, *supra*)

(3) *MacKenzie* v. *Climax Industries,* 73 N. Y. S. (2d) 504 (1947).

The court's dictum that "It has been held that a partnership has no residence distinct from the

residence of the individual partners" was based on the *Bulkley* and *Searle* cases, *supra,* both of which antedated C. P. A. § 222-a. *Compare*: *Wegman* v. *Republic Camera Co., supra.*

We submit that the District Court below erred, in attempting to carry out the mandate of Rule 17 (b), in holding that under New York law a partnership is not a jural entity separate from its individual partners.

CONCLUSION

For the reasons stated in the Petition and in this Brief, and particularly since this case involves important questions of statutory construction arising under the Judicial Code, as to which there are conflicting decisions, we urge that writs of certiorari be issued in order that the questions presented in the foregoing Petition may be reviewed by this Court.

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Respectfully submitted,

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